No. 88-1 (7)

FILED
NOV 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

CONSOLIDATED RAIL CORPORATION, PETITIONER

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

CORRECTED COPY

CHARLES FRIED
Solicitor General

JOHN R. BOLTON
Assistant Attorney General

THOMAS W. MERRILL
Deputy Solicitor General

LAWRENCE S. ROBBINS
Assistant to the Solicitor General

LEONARD SCHAITMAN
JEFFREY CLAIR
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

31 pp

QUESTION PRESENTED

Whether a railroad's addition of a drug screen to the long-standing urinalysis component of its routine fitness-for-duty physical examinations gives rise to a "major" dispute under the Railway Labor Act, 45 U.S.C. 151 *et seq.*, and is therefore not subject to arbitration by an adjustment board.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement:	
A. The statutory framework	2
B. The present controversy	5
Summary of argument	9
Argument:	
The court of appeals misapprehended the legal principles for determining whether a labor dispute is "major" or "minor" under the Railway Labor Act	10
A. A labor dispute is "minor" if it concerns a matter that is "arguably" governed by the contractual relationship between the parties	10
B. The court of appeals misapplied the principles for determining whether an action is "arguably" justified by the collective bargaining agreement	18
Conclusion	25

TABLE OF AUTHORITIES

Cases:

Andrews v. *Louisville & N.R.R.*, 406 U.S. 320 (1972)	13, 14
Atchison T. & S. F.R.R. v. *Buell*, No. 85-1140 (Mar. 24, 1987)	4, 15
Baylis v. *Marriott Corp.*, 843 F.2d 658 (2d Cir. 1988)	11, 12
Brotherhood of Locomotive Engineers v. *Atchison, T. & S.F. Ry.*, 768 F.2d 914 (7th Cir. 1985)	12, 16
Brotherhood of Locomotive Engineers v. *Consolidated Rail Corp.*, 844 F.2d 1218 (6th Cir. 1988)	11

Cases—Continued: Page

Brotherhood of Locomotive Engineers v. *Louisville & N. R.R.*, 373 U.S. 33 (1963) 12, 13, 16
Brotherhood of Locomotive Engineers v. *Missouri-Kansas-Texas R.R.*, 363 U.S. 528 (1960) 15
Brotherhood of Maintenance of Way Employees, Lodge 16 v. *Burlington N. R.R.*, 802 F.2d 1016 (8th Cir. 1986) 11, 20
Brotherhood of Ry. Clerks v. *Atchison, T. & S. F. Ry.*, 847 F.2d 403 (7th Cir. 1988) 10-11, 19
Brotherhood of Railroad Trainmen v. *Chicago R. & I.R.R.*, 353 U.S. 30 (1957) 14, 15
Brotherhood of Railroad Trainmen v. *Jacksonville Terminal Co.*, 394 U.S. 369 (1969) 3, 21
Burlington N. R.R. v. *Brotherhood of Maintenance of Way Employees*, No. 86-39 (Apr. 28, 1987) 3
Chicago & N.W.R.R. v. *Transportation Union*, 402 U.S. 570 (1971) 22
Communications Workers v. *Beck*, No. 86-637 (June 29, 1988) 21
Collyer Insulated Wire, 192 N.L.R.B. 837 (1971) .. 22, 23
Detroit & Toledo Shore Line R.R. v. *United Transportation Union*, 396 U.S. 142 (1969) 3, 17, 20
Division No. 1, Detroit, Brotherhood of Locomotive Engineers v. *Consolidated Rail Corp.*, 844 F.2d 1218 (6th Cir. 1988) 17
Elgin, J. & E. R.R. v. *Burley*, 325 U.S. 711 (1945), aff'd on reh'g, 327 U.S. 661 (1946) 3, 4, 13, 19
First National Maintenance Corp. v. *NLRB*, 452 U.S. 666 (1984) 21
International Ass'n of Machinists v. *Soo Line R.R.*, 850 F.2d 368 (8th Cir. 1988) 10
International Ass'n of Machinists & Aerospace Workers v. *Northwest Airlines, Inc.*, 843 F.2d 1119, vacated as moot, 854 F.2d 1089 (8th Cir. 1988) 12, 16
International Brotherhood of Teamsters v. *Southwest Airlines Co.*, 842 F.2d 794 (5th Cir. 1988) .. 11, 18, 19
NLRB v. *United Food & Commercial Workers Union*, No. 86-594 (Dec. 14, 1987) 21

Cases—Continued: Page

National Ry. Labor Conf. v. *International Ass'n of Machinists & Aerospace Workers*, 830 F.2d 741 (7th Cir. 1987) 18-19
O'Donnell v. *Wien Air Alaska, Inc.*, 551 F.2d 1141 (9th Cir. 1977) 11-12
Order of Conductors v. *Pitney*, 326 U.S. 561 (1946) 14
RLEA v. *Boston & Maine Corp.*, 808 F.2d 150 (1st Cir. 1986), cert. denied, No. 86-2054 (Oct. 5, 1987) 11
RLEA v. *Norfolk & W. Ry.*, 833 F.2d 700 (7th Cir. 1987), cert. denied, No. 86-2054 (Oct. 5, 1987) 17, 19-20
Slocum v. *Delaware L. & W. R.R.*, 339 U.S. 239 (1950) 13-14
Star Tribune, a Division of Cowles Media Co., Nos. 18-CA-9938, 18-CA-10296 & J-D 266-88 (NLRB Nov. 3, 1988) 21
Switchmen's Union v. *Southern Pac. Co.*, 398 F.2d 443 (9th Cir. 1968) 11
Transportation Union v. *Union Pac. R.R.*, 385 U.S. 157 (1966) 13
Union Pac. R.R. v. *Price*, 360 U.S. 601 (1959) 14
Union Pac. R.R. v. *Sheehan*, 439 U.S. 89 (1978) 5, 14, 15, 17
United Technologies Corp., 268 N.L.R.B. 557 (1984) 23
Walker v. *Southern R.R.*, 385 U.S. 196 (1966) 5
William E. Arnold Co. v. *Carpenters District Council*, 417 U.S. 12 (1974) 24

Constitution and statutes:

U.S. Const. Amend. IV 7
National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
§ 3(d), 29 U.S.C. 153(d) 21
§ 8(a)(1), 29 U.S.C. 158(a)(1) 23
Norris-LaGuardia Act, 29 U.S.C. 101 *et seq.* 14-15
Railway Labor Act, 45 U.S.C. 151 *et seq.* 1, 2, 7, 14
45 U.S.C. 151a 2

Statutes—Continued: Page

45 U.S.C. 152 First 2
45 U.S.C. 152 Second 3
45 U.S.C. 152 Seventh 3
45 U.S.C. 153 First 4
45 U.S.C. 153 First (h) 4
45 U.S.C. 153 First (i) 4, 5, 16
45 U.S.C. 153 First (*l*) 5
45 U.S.C. 153 First (m) 5
45 U.S.C. 153 First (q) 5, 15
45 U.S.C. 153 Second 4, 5
45 U.S.C. 154 4
45 U.S.C. 155 4
45 U.S.C. 155 First 3
45 U.S.C. 156 ..... 3, 6
45 U.S.C. 157 3
45 U.S.C. 160 ..... 2, 3
29 U.S.C. 173(d) 22

Miscellaneous:

Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L. J. 567 (1937) 13
H.R. Rep. 328, 69th Cong., 1st Sess. (1926) 2
NLRB General Counsel's Memorandum on Drug and Alcohol Testing, Memorandum GC 87-5 (Sept. 8, 1987) 21, 22, 24

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1

CONSOLIDATED RAIL CORPORATION, PETITIONER

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case concerns the question whether, under the Railway Labor Act, 45 U.S.C. 151 *et seq.*, a particular labor dispute must be resolved through collective bargaining, with the attendant possibility of a work stoppage, or whether, instead, it must be referred in the first instance to the grievance arbitration process, conducted by specially designed "adjustment boards." The United States has long sought to encourage the peaceful resolution of labor disputes likely to disrupt interstate transportation in the railroad and airline industries, both of which are cov-

ered by the Railroad Labor Act. Grievance arbitration affords labor and management an expeditious forum for resolving disputes over the interpretation and implementation of collective bargaining agreements. At the same time, it minimizes the risk that those disputes will result in work stoppages that may seriously disrupt the flow of interstate commerce. When there is a prospect of a seriously disruptive work stoppage, the United States also has a direct, programmatic interest, since the President may be called upon to create an emergency board to investigate and report on the underlying labor dispute. See 45 U.S.C. 160. More generally, the United States has an interest in clarifying the appropriate relationship between the railroad adjustment boards and the courts, and thus the proper scope of the arbitration process.

STATEMENT

A. The Statutory Framework

1. The Railway Labor Act, 45 U.S.C. 151 *et seq.*, is designed to ensure "the public continuity and efficiency of interstate transportation service, and to protect the public from injuries and losses consequent upon any impairment or interruption of interstate commerce * * *." H.R. Rep. 328, 69th Cong., 1st Sess. 1 (1926). In order "[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein" (45 U.S.C. 151a), the Act imposes a duty on "all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise" (45 U.S.C. 152 First).

2. Where settlement between the parties cannot be achieved, however, the Act provides two distinct

procedures for resolving disputes. On the one hand, it provides for prolonged negotiation and mediation, followed if necessary by the availability of self-help. On the other hand, it establishes binding, compulsory arbitration. Whether one procedure or the other is available depends on the nature of the underlying dispute.

So-called "major" disputes involve "the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy." *Elgin, J. & E. R.R.* v. *Burley*, 325 U.S. 711, 723 (1945), aff'd on reh'g, 327 U.S. 661 (1946). Because major disputes "present the large issues about which strikes ordinarily arise" and "because they seek to create rather than to enforce contractual rights, they have been left for settlement entirely to the processes of noncompulsory adjustment" (325 U.S. at 723-724). Where such a dispute is involved, the parties must maintain the status quo while they engage in a lengthy process of negotiation, mediation, and possibly review by a Presidential Emergency Board. *Detroit & Toledo Shore Line R.R.* v. *United Transportation Union*, 396 U.S. 142 (1969). If that process fails to produce an agreement, however, each side is free to resort to strikes, lock-outs, or other forms of economic self-help calculated to achieve the desired objectives. See 45 U.S.C. 152 Second and Seventh, 155 First, 156, 157, 160; *Burlington N. R.R.* v. *Brotherhood of Maintenance of Way Employees*, No. 86-39 (Apr. 28, 1987), slip op. 14 n.10; *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969).

By contrast, "minor" disputes involve "the meaning or proper application" of a particular collective bargaining agreement, or they may relate to the so-called "omitted case," in which a dispute "is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement" (*Elgin*, 325 U.S. at 723). Like "major" disputes, "[m]inor disputes initially must be dealt with through a railroad's internal resolution processes." *Atchison T. & S. F. R.R.* v. *Buell*, No. 85-1140 (Mar. 24, 1987), slip op. 6. Unlike a major dispute, however, if a minor dispute is not settled through initial discussions, it may be "referred by petition of the parties or by either party" to one of a number of grievance "adjustment boards." 45 U.S.C. 153 First (i).[1] Submission of the grievance

---

[1] The statute authorizes the creation of several different types of adjustment boards. The National Railroad Adjustment Board ("NRAB") is a standing body created by Congress. 45 U.S.C. 153 First. It is divided into four divisions, each having jurisdiction over particular job classificatons. 45 U.S.C. 153 First (h). In addition, the parties, upon mutual agreement, may establish system, group, or regional boards of adjustment. 45 U.S.C. 153 Second. The creation of such boards is wholly voluntary, and either party to an agreement creating one of these boards may elect to come under the NRAB's jurisdiction upon ninety days notice (*ibid.*). Finally, the statute provides that any carrier or union may request the establishment of a special board of adjustment to resolve any dispute otherwise referable to the NRAB or any dispute that has been pending before the NRAB for twelve months. 45 U.S.C. 153 Second. These special boards, commonly known as "public law" boards, must be established upon demand. The parties are consequently required to join in an agreement establishing the board. If the parties fail to reach such an agreement, the National Mediation Board (see 45 U.S.C. 154, 155) can designate members of the board on a party's behalf. The board as designated must then determine all unresolved matters relating to its establishment and jurisdiction. 45 U.S.C. 153 Second.

to arbitration by an adjustment board is compulsory upon the request of either party; it does not depend on mutual agreement or consent. 45 U.S.C. 153 First (i), Second; see *Walker* v. *Southern R.R.*, 385 U.S. 196, 198 (1966). The boards, moreover, are structured so as to preclude deadlock and ensure a reasonably prompt decision. 45 U.S.C. 153 First (*l*), Second. And the decision of the adjustment board is final and binding upon the parties. 45 U.S.C. 153 First (m), Second. Thus, judicial review of an adjustment board decision is narrowly limited to whether the board exceeded its jurisdiction, failed to comply with specific statutory requirements of the Railway Labor Act, or was influenced by fraud or corruption. 45 U.S.C. 153 First (q), Second; *Union Pac. R.R.* v. *Sheehan*, 439 U.S. 89, 93 (1978) (per curiam).

B. The Present Controversy

1. Since its inception in 1976, petitioner, Consolidated Rail Corporation (Conrail), has required all of its employees to undergo periodic physical examinations. Conrail has also required train and engine employees who have been out of service for at least 30 days due to furlough, leave, suspension, or similar causes to undergo physical examinations upon returning to duty; in the case of all other employees, it has imposed the same return-to-service requirement if those employees have been furloughed, on leave, or suspended for at least 90 days. These physical examinations have included urinalysis for blood sugar and albumin, although they have not ordinar-

ily included a drug screen. Conrail has in the past required a drug screen only for employees who were taken out of service for drug-related conduct, or when, in the judgment of the examining physician, the employee may have been using drugs. Finally, Conrail employees have always been subject to "Rule G," an industry-wide rule that prohibits the use or possession of narcotics or intoxicants by employees who are on duty or who are subject to duty. Pet. App. A3-A4, A58-A59.[2]

On February 20, 1987, Conrail announced its decision to add a drug screen as part of the urinalysis in all periodic and return-to-duty physical examinations. The company explained that an employee who tested positive for drugs in such an examination would be barred from service unless, within 45 days, he could provide a negative drug test from a medical facility approved by Conrail's Medical Director. In addition, Conrail stated, an employee whose first test was positive would be given the opportunity to be evaluated by Conrail's Employee Counseling Service. If the evaluation revealed drug addiction, and the employee agreed to enter a treatment program, he would be given an additional period, up to 125 days, in which to provide a negative drug test. Pet. App. A5, A51.

2. Respondents thereafter filed suit in the United States District Court for the Eastern District of Pennsylvania, alleging that Conrail's action violated Section 6 of the Railway Labor Act, 45 U.S.C. 156,

[2] In 1984, Conrail announced that it would add a drug screen to the urinalysis conducted during its periodic, fitness-for-duty examinations. But that drug screen was implemented only in Conrail's Eastern Region and was discontinued after six months (Pet. App. A49).

and constituted an unreasonable search and seizure under the Fourth Amendment. It sought to enjoin Conrail from instituting the drug screen. Pet. App. A5.

The district court dismissed the complaint for want of subject matter jurisdiction (Pet. App. A23-A26), concluding, in pertinent part, that respondents' objection to the drug screen constituted a "minor" dispute and was therefore "subject to the mandatory and exclusive jurisdiction of the National Railroad Adjustment Board or a public law board" (*id.* at A23). The district court reasoned (*id.* at A24) that "[a] dispute is minor if the parties' agreement is reasonably susceptible of the contested interpretation or if the employer's action is arguably justified under the terms of the existing agreement." The court noted (*ibid.*) that Conrail had consistently included a urinalysis component in its periodic and return-to-work medical tests, and that under some circumstances the company had required a drug screen as well. The court therefore concluded that "Conrail's decision to expand its use of drug testing is arguably justified under terms of the parties' long-standing medical policy" (*ibid.*).[3]

3. The Third Circuit reversed (Pet. App. A1-A19), holding that Conrail's addition of a drug screen constituted a "major" dispute under the Railway Labor Act. The court recognized (*id.* at A9) that "[i]f the disputed action * * * can 'arguably'

[3] The district court also dismissed respondents' Fourth Amendment claim because they "failed to show for purposes of this motion that Conrail is a federal actor whose actions are subject to constitutional scrutiny" (Pet. App. A25). Respondents did not appeal from that determination, and the constitutional issue is not presented in this case.

be justified by the existing agreement or * * * if the contention that the labor contract sanctions the disputed action is not 'obviously insubstantial', the controversy is [a minor dispute] within the exclusive province of the National Railroad Adjustment Board." The court concluded, however, "that the agreement governing prior medical examinations cannot be strained to include, even arguably, an agreement to routinely perform a drug screen" (*id.* at A17). The court explained that the legislative history of the Act "makes clear * * * that 'minor' disputes, with their attendant compulsory arbitration, were to be limited to 'comparatively minor' problems" (*id.* at A8). A drug screen, the court observed, could not meet that standard, because "[e]mployee drug testing is a controversial issue throughout the railroad industry and beyond" and because "[t]he practice poses serious ethical and practical dilemmas" (*id.* at A16). The court acknowledged (*id.* at A9) that "it is not necessary that the terms of a collective bargaining agreement governing relations under the Act be embodied in a written document" and that the agreement might instead "be inferred from habit and custom." It nevertheless observed that Conrail could not "point to any existing agreement between the parties on such crucial matters as the drug test to be used, the methods of confirming positive results, and the confidentiality protections to be employed" (*id.* at A17). Finally, the court of appeals found it "particularly significant that the General Counsel of the National Labor Relations Board has taken the position that drug screening, even where it is added to a pre-existing medical examination program, constitutes a substantial change in working conditions and is a mandatory subject of bargaining under the National Labor Relations Act" (*id.* at A16-A17).

SUMMARY OF ARGUMENT

A. The courts of appeals—including, at least nominally, the court below—uniformly hold that a labor dispute is "minor," and therefore subject to arbitration under the Railway Labor Act, if the challenged action is "arguably justified" by the parties' contractual relationship. That standard comports with this Court's insistence that matters of contractual interpretation be left to the adjustment boards under the Act, and that such issues not be resolved by the courts. Moreover, a presumption of arbitrability is fully consistent with the parties' right to bargain collectively over "major" disputes, since if an adjustment board concludes that the dispute is a major one, it will issue an order to that effect and will remit the parties to negotiation and mediation under the statute.

B. Although the court of appeals articulated the correct legal standard, in applying that standard it relied on factors that are entirely at odds with the presumption of arbitrability. The court erred at the outset because it believed that "minor" disputes are limited to "comparatively minor problems." That is not so. The term "minor" is a term of art, and it refers to any dispute that is "arguably" governed by the agreement, regardless of how "important" the disputed issue is to one or both of the parties. The court next erred in requiring petitioner to show an express agreement about the details of its drug screening policy. That is wrong, because parties do not ordinarily spell out all the terms of their agreement in a formal contract, and because a dispute

may be "arguably" governed by the contract, even if the contract does not descend to elaborate detail. Finally, the court of appeals relied mistakenly on the NLRB General Counsel's memorandum concerning drug tests under the National Labor Relations Act. In particular, the court of appeals overlooked the fact that the Labor Board, like the courts under the RLA, will defer to the arbitration process in appropriate cases.

We believe that, under a correct application of the governing legal standard, the dispute over petitioner's addition of a drug screen is "arguably justified" by the contract and should be referred to an adjustment board. Although a board may ultimately agree with respondent that the terms of the contract do not resolve the dispute—and therefore remit the matter to the collective bargaining process—the Railway Labor Act requires that the board initially be given the opportunity to make that determination.

ARGUMENT

THE COURT OF APPEALS MISAPPREHENDED THE LEGAL PRINCIPLES FOR DETERMINING WHETHER A LABOR DISPUTE IS "MAJOR" OR "MINOR" UNDER THE RAILWAY LABOR ACT

A. A Labor Dispute Is "Minor" If It Concerns A Matter That Is "Arguably" Governed By The Contractual Relationship Between The Parties

1. The courts of appeals have uniformly held that a labor dispute is "minor" for purposes of the Railway Labor Act if it involves a matter that is "arguably" comprehended by the contractual relationship between the parties.[4] As the Eighth Circuit ex-

[4] See, *e.g.*, *International Ass'n of Machinists* v. *Soo Line R.R.*, 850 F.2d 368, 376 (8th Cir. 1988) (en banc); *Brotherhood of Ry. Clerks* v. *Atchison, T. & S. F. Ry.*, 847 F.2d 403, 406 (7th Cir. 1988); *Brotherhood of Locomotive Engineers* v. *Consolidated Rail Corp.*, 844 F.2d 1218, 1221 (6th Cir. 1988); *Baylis* v. *Marriott Corp.*, 843 F.2d 658, 663 (2d Cir. 1988); *International Brotherhood of Teamsters* v. *Southwest Airlines Co.*, 842 F.2d 794, 803 (5th Cir. 1988); *RLEA* v. *Boston & Maine Corp.*, 808 F.2d 150, 159 (1st Cir. 1986), cert. denied, No. 86-2054 (Oct. 5, 1987); *Switchmen's Union* v. *Southern Pac. Co.*, 398 F.2d 443, 447 (9th Cir. 1968).

plained in a recent case, "[t]his Court has said that a dispute is minor if the agreement is 'reasonably susceptible' of the interpretations sought by both the employer and the employees. Other courts have said that a dispute is minor if the employer's action can be arguably justified under the terms of the existing agreement * * *, or that the dispute is minor unless the employer's argument that its actions are within the contract is 'obviously insubstantial.' These locutions are essentially the same in their result." *Brotherhood of Maintenance of Way Employees, Lodge 16* v. *Burlington N. R.R.*, 802 F.2d 1016, 1022 (8th Cir. 1986) (citations omitted). The court below approved the same standard—at least nominally—when it stated (Pet. App. A9), "[i]f the disputed action of one of the parties can 'arguably' be justified by the existing agreement or, in somewhat different statement, if the contention that the labor contract sanctions the disputed action is not 'obviously insubstantial,' the controversy is [a minor dispute] within the exclusive province if the National Railroad Adjustment Board."

The "arguably justified" standard "is not a stringent one in view of the substantial and long-standing interest in removing labor disputes from the federal courts and placing them in the expert hands of the various arbitration and mediation facilities." *O'Don-*

nell v. *Wien Air Alaska, Inc.*, 551 F.2d 1141, 1146-1147 (9th Cir. 1977). The rule reserves only a modest role for the courts. A court may not "interpret or construe the language of the contract"; its task is only to "determine whether th[e] case implicates a question of contract interpretation." *International Ass'n of Machinists & Aerospace Workers* v. *Northwest Airlines, Inc.*, 843 F.2d 1119, 1122 (8th Cir. 1988). Thus, "[i]f the question of whether a dispute is 'major' or 'minor' is close, it should be viewed as being 'minor' unless the carrier's contractual justification is 'obviously insubstantial' and the contract is not 'reasonably susceptible' to the carrier's interpretation." *Baylis* v. *Marriott Corp.*, 843 F.2d 658, 663 (2d Cir. 1988).[5]

2. Although this Court has more than once characterized particular labor disputes as "major" or "minor" (see, *e.g.*, *Brotherhood of Locomotive Engineers* v. *Louisville & N. R.R.*, 373 U.S. 33, 36 & n.3 (1963)), it has not had occasion to decide the legal standard under which a given dispute may be found to be "minor," and therefore subject to arbitration by an adjustment board. The Court has, however, articulated several principles that, taken together, confirm that, to the fullest extent practicable, disputes concerning contractual interpretation should be resolved by the adjustment boards.

a. First, the Court has repeatedly emphasized that the adjustment boards have unusual expertise in the

[5] As the Seventh Circuit has noted, "[s]ince the machinery for resolving major disputes is conciliatory rather than binding, a major dispute can escalate into a strike, which in the transportation industries * * * can be a calamity. So it is no surprise that, when in doubt, the courts construe disputes as minor." *Brotherhood of Locomotive Engineers* v. *Atchison, T. & S.F. Ry.*, 768 F.2d 914, 920 (1985).

interpretation of collective bargaining agreements. "[T]he Board is acquainted with established procedures, customs and usages in the railway labor world. It is the specialized agency selected to adjust these controversies." *Elgin J. & E. R.R.* v. *Burley*, 327 U.S. 661, 664 (1946). As the Court has noted, "[t]he Adjustment Board is well equipped to exercise its congressionally imposed functions. Its members understand railroad problems and speak the railroad jargon.[6] Long and varied experiences have added to the Board's initial qualifications." *Slocum* v. *Delaware L. & W. R.R.*, 339 U.S. 239, 243 (1950) (footnote omitted).

b. Second and relatedly, the Court has held that the adjustment boards have exclusive jurisdiction over issues of contract interpretation, and that courts may not interfere with that jurisdiction. *Andrews* v. *Louisville & N. R.R.*, 406 U.S. 320, 325 (1972); *Transportation Union* v. *Union Pac. R.R.*, 385 U.S. 157, 160, 164 (1966); *Brotherhood of Locomotive Engineers* v. *Louisville & N. R.R.*, 373 U.S. 33, 38 (1963); *Slocum*, 339 U.S. at 24. As the Court has explained, "[t]he Adjustment Board was created as a tribunal consisting of workers and management to secure the prompt, orderly and final settlement of grievances that arise daily between employees and

[6] Soon after the National Railroad Adjustment Board was created, one commentator noted the kind of jargon that the adjustment boards might be called upon to construe. "The following bulletin was issued by a superintendent of the Southern Pacific Ry. in San Jose, Cal., on Dec. 20, 1928: 'All Yardmasters: Effective date, all yardmen in cannon-ball service bringing drags in yard from outside points will bleed and cut own cars'." Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L. J. 567, 569 n.10 (1937).

carriers regarding rates of pay, rules and working conditions." *Union Pac. R.R.* v. *Sheehan*, 439 U.S. 89, 94 (1978). For that reason, "Congress considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts" (*ibid.*). See also *Andrews* v. *Louisville & N. R.R.*, 406 U.S. 320 (1972) (rail employee may not maintain a wrongful discharge action in the courts but is limited instead to the grievance adjustment remedies established by the Railway Labor Act); *Union Pac. R.R.* v. *Price*, 360 U.S. 601 (1959) (once an aggrieved party has pressed a wrongful discharge claim before the adjustment board, he may not relitigate the same matter in a judicial action for damages); *Slocum* v. *Delaware, L. & W. R.R.*, 339 U.S. 239 (1950) (a dispute between two unions concerning the scope of their collective bargaining agreements was within the adjustment board's exclusive jurisdiction and could not be resolved by the state courts); *Order of Conductors* v. *Pitney*, 326 U.S. 561 (1946) (where a jurisdictional dispute between two unions turns on the meaning of an existing collective bargaining agreement, a federal court must stay its decision pending the adjustment board's interpretation of the agreement).

Because the adjustment board's jurisdiction over matters of interpretation is exclusive under the Act, the Court has also held that the parties may not resort to self-help measures to vindicate a claim arising from the interpretation of their contract. For example, in *Brotherhood of Railroad Trainmen* v. *Chicago R. & I. R.R.*, 353 U.S. 30 (1957), the Court held that rail labor unions may not strike over minor disputes pending before the National Railroad Adjustment Board and that, notwithstanding the Nor-

ris-LaGuardia Act, 29 U.S.C. 101 *et seq.*, a federal court may enjoin a union from striking over a minor dispute. The Court accordingly rejected the union's contention "that there is no compulsion on either side to allow the Board to settle a dispute if an alternative remedy, such as resort to economic duress, seems more desirable." 353 U.S. at 34. "Such an interpretation," the Court concluded, "would render meaningless those provisions in the Act which allow *one* side to submit a dispute to the Board, whose decision shall be final and binding on *both* sides." *Ibid.* (emphasis in original). See also *Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas R.R.*, 363 U.S. 528, 534 (1960) (injunction against strike during minor dispute may be qualified by conditions against self-help by railroad, "at least where [the conditions] are designed not only to promote the interests of justice, but also to preserve the jurisdiction of the Board").

c. Finally, the Court has held that "[j]udicial review of these Boards' determinations * * * [is] '"among the narrowest known to the law."'" *Atchison T. & S. F. R.R.* v. *Buell*, No. 85-1140 (Mar. 24, 1987), slip op. 6 (citations omitted)). Under 45 U.S.C. 153 First (q), review of a board order "is limited to three specific grounds: (1) failure of the Adjustment Board to comply with the requirements of the Railway Labor Act; (2) failure of the Adjustment Board to conform, or confine, itself to matters within the scope of its jurisdiction; and (3) fraud or corruption." *Union Pac. R.R.* v. *Sheehan*, 439 U.S. 89, 93 (1978) (per curiam). The Court has therefore held that a court of appeals may not overturn a board decision simply because the decision may be characterized as one of law. See *ibid.* And

the Court has made clear that a party seeking to enforce its interpretation of a board decision may not engage in self-help, but is relegated instead to the concededly narrow process of judicial review. *Brotherhood of Locomotive Engineers* v. *Louisville & N. R.R.*, 373 U.S. 33 (1963).[7]

3. These principles all point to a legal standard that treats a dispute as "minor", and therefore subject to arbitration, whenever the employer's action is "arguably justified" by the agreement. As the Eighth Circuit has noted, the "arguably justified" standard "is a necessary adjunct of the need to protect the arbitrator's exclusive jurisdiction over minor disputes." *International Ass'n of Machinists & Aerospace Workers* v. *Northwest Airlines, Inc.*, 843 F.2d 1119, 1123, vacated as moot, 854 F.2d 1089 (8th Cir. 1988). On the one hand, it ensures that the broadest range of contractual issues will be deferred to the adjustment boards, thereby allowing them to discharge their statutory obligation to resolve all "disputes * * * growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." 45 U.S.C. 153 First (i). On the other hand, the "arguably justified" standard accords with Congress' in-

[7] Indeed, as one court of appeals has noted, "[p]erhaps 'review' is a misnomer. The district court (and this court, on appeal from the district court) does not review the correctness of the arbitration award, even under a highly deferential standard, such as 'clearly erroneous' or 'clear abuse of discretion.' All it asks, unless issues of fraud or corruption are raised, * * * is whether the arbitrators did the job they were told to do—not whether they did it well, or correctly, or reasonably, but simply whether they did it." *Brotherhood of Locomotive Engineers* v. *Atchison T. & S.F. Ry.*, 768 F.2d 914, 921 (7th Cir. 1985).

tention that under the Railway Labor Act it is "essential to keep these so-called 'minor' disputes * * * out of the courts." *Union Pac. R.R.* v. *Sheehan*, 439 U.S. at 94. The court's function therefore ends once it is satisfied that there is a non-frivolous basis in the contract for the disputed action.

4. We note, finally, that a presumption in favor of arbitral jurisdiction does not jeopardize the parties' statutory right to demand collective bargaining over matters that involve a "major" dispute. When a court concludes that a dispute is "minor," it is *not* determining "the more searching question of which party's view of the existing agreement is correct." *Division No. 1, Detroit, Brotherhood of Locomotive Engineers* v. *Consolidated Rail Corp.*, 844 F.2d 1218, 1221 (6th Cir. 1988). Accord *RLEA* v. *Norfolk & W. Ry.*, 833 F.2d 700, 707 (7th Cir. 1987), cert. denied, No. 86-2054 (Oct. 5, 1987). Rather, it is determining only that the contractual arguments are sufficiently plausible to warrant committing the question to the adjustment board for initial determination. Once the dispute is referred to an adjustment board by one of the parties, the board is free to decide the merits of the controversy, and it may well conclude that the contract does not, in fact, sanction the challenged conduct. In that event, the adjustment board will fashion an appropriate order, and the party seeking to depart from the contract—as that contract has been construed by the adjustment board—is remitted to the process of "negotiation, mediation, voluntary arbitration, and conciliation" (*Detroit & Toledo Shore Line R.R.* v. *Transportation Union*, 396 U.S. at 148-149), followed by the availability of self-help. The parties' right to negotiate changes in pay or working conditions

through collective bargaining is therefore protected, but it is protected in a manner that does not require inappropriate judicial intrusion into the adjustment board's jurisdiction over questions of contract interpretation.

B. The Court of Appeals Misapplied The Principles for Determining Whether an Action is "Arguably" Justified by the Collective Bargaining Agreement

The court of appeals articulated the correct legal standard in resolving the dispute over Conrail's proposed drug screen. But the court misapplied that standard, relying on factors that are wholly at odds with the presumption of arbitrability.

1. The court of appeals got off on the wrong track at the outset, when it took as its premise that "minor" disputes are "limited to 'comparatively minor' problems" (Pet. App. A8). Apparently for that reason, the court found it significant that "[e]mployee drug testing is a controversial issue throughout the railroad industry and beyond" and that "[t]he practice poses serious ethical and practical dilemmas" (*id.* at A16).

As the Fifth Circuit has explained, however, "the method for determining whether a dispute is major or minor has absolutely nothing to do with how important a dispute is. The sole question is whether the proposed change has a basis in the contract." *International Brotherhood of Teamsters* v. *Southwest Airlines Co.*, 842 F.2d 794, 803 (5th Cir. 1988). "There is no necessary connection between the magnitude of the impact of a practice and its inclusion in (or exclusion from) a collective bargaining agreement." *National Ry. Labor Conf.* v. *International Ass'n of Machinists & Aerospace Workers*, 830 F.2d

741, 747 n.5 (7th Cir. 1987). In that respect, the term "minor" is something of a misnomer, since it refers not to the "impact of the dispute on the practices of the parties" but only to "whether or not there is a nonfrivolous argument that reference to a collective bargaining agreement will resolve the dispute" (*ibid.*).[8]

2. The court of appeals also erred in requiring petitioner to "point to an[] existing agreement between the parties on such crucial matters as the drug test to be used, the methods of confirming results, and the confidentiality protections to be employed" (Pet. App. A17). There are two possible objections to that requirement, depending on what the court of appeals meant by its remarks.

First, the court may have meant that a dispute is minor only if it is governed by the *explicit* terms of the bargaining agreement. If so, the court was surely mistaken. It is uniformly recognized that "[i]n determining whether a proposal is 'arguably justified' by the contract [courts] must look both to the contract itself and to the practices under the contract." *International Brotherhood of Teamsters* v. *Southwest Airlines Co.*, 842 F.2d 794, 804 (5th Cir. 1988). Accord *Brotherhood of Ry. Clerks* v. *Atchison, T. & S.F. Ry.*, 847 F.2d 403, 406 (7th Cir. 1988); *RLEA* v.

---

[8] The court of appeals mistakenly relied (Pet. App. A8) on this Court's *Elgin* decision for the proposition that "minor" disputes refer only to "comparatively minor" issues. This Court used the phrase "comparatively minor" as a way of stating that "minor" disputes do not ordinarily give rise to work stoppages. 325 U.S. at 723-724. And while there is language in the opinion suggesting that "major" disputes involve "large issues" (*id.* at 723), it is clear that there, too, the Court was differentiating "major" disputes on the ground that they more often result in strike actions.

Norfolk & W. Ry., 833 F.2d 700, 705 (7th Cir. 1987), cert. denied, No. 86-2054 (Oct. 5, 1987); *Brotherhood of Maintenance of Way Employees, Lodge 16* v. *Burlington N. R. R.*, 802 F.2d 1016, 1022 (8th Cir. 1986). In the present case, not only the formal agreement with respondents, but also the historical understandings and practices that have evolved in implementing the agreement, are relevant in deciding whether the addition of a drug screen to the long-standing urinalysis test is "arguably justified."

Alternatively, the court of appeals may have meant that, although a court may look to the entire contractual relationship, it should defer to the arbitration process only if the parties' agreement and associated understandings address the disputed issue in considerable detail. Thus, because the contractual relationship between Conrail and its employees did not resolve such "crucial matters" as testing methods and privacy protections, the court could not find even an "arguable" justification in the contract. As this Court has explained, however, "[i]t would be virtually impossible to include all working conditions in a collective-bargaining agreement." *Detroit & Toledo Shore Line R.R.* v. *United Transportation Union*, 396 U.S. 142, 154-155 (1969). The same holds true even if one examines the entire contractual relationship, written and unwritten: the parties ordinarily will not have considered and expressly agreed on every detail of a particular issue. Nevertheless, the question whether the agreement between the parties "arguably" governs a particular dispute does not require, or permit, a *court* to delve that far into the minutiae of the contractual relationship. If the issue in dispute is generally (even if not specifically) within the ambit of the relationship, that should be sufficient to refer the matter to an adjustment board.

3. The court of appeals also found "particularly significant" an opinion of the NLRB General Counsel that "drug screening, even where it is added to a pre-existing medical examination program, constitutes a substantial change in working conditions and is a mandatory subject of bargaining under the National Labor Relations Act" (Pet. App. A16-A17). The court's reliance is misplaced for two reasons.[9]

First, as this Court has more than once explained, "the National Labor Relations Act cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly, and with due regard for the many differences between the statutory schemes." *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969). Accord *Communications Workers* v. *Beck*, No. 86-637 (June 29, 1988), slip op. 5, 8; *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 686-687 n.23 (1981); *Chicago & N.W. R.R.* v. *Transportation Union*, 402 U.S. 570, 579 n.11 (1971). An-

[9] The General Counsel's memorandum is a set of guidelines that the General Counsel, in the exercise of her prosecutorial authority under Section 3(d) of the National Labor Relations Act (NLRA), 29 U.S.C. 153(d), has formulated "to assist the Regional Offices in the disposition of pending and future cases involving drug testing" (*NLRB General Counsel's Memorandum on Drug and Alcohol Testing*, Memorandum GC 87-5, at D-1 (Sept. 8, 1987)). Cf. *NLRB* v. *United Food & Commercial Workers Union*, No. 86-594 (Dec. 14, 1987), slip op. 17 (distinguishing between "prosecutorial" determinations of the General Counsel and "adjudicatory" decisions of the Labor Board). The General Counsel's position concerning drug testing has been upheld by NLRB administrative law judges in several cases (see, *e.g.*, *Star Tribune, a Division of Cowles Media Co.*, Nos. 18-CA-9938, 18-CA-10296 & J-D 266-88 (Nov. 3, 1988)), but the matter has not yet been adjudicated by the Board.

alogy to the NLRA is inappropriate in this case, because there is no system under the NLRA that is comparable to compulsory arbitration under the Railway Labor Act. To be sure, the NLRA provides that "[f]inal adjustment by a method agreed upon by the parties is * * * the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." 29 U.S.C. 173(d). But unlike the Railway Labor Act, the NLRA does not mandate arbitration of grievances, nor does it establish special adjustment boards with expertise in labor contracts and exclusive jurisdiction over questions of interpretation.

In any event, the court of appeals overlooked a relevant part of the General Counsel's memorandum. Under the NLRA, a particular matter may be a mandatory subject of bargaining, but at the same time may be subject to arbitration under the collective bargaining agreement. As the General Counsel explained elsewhere in the memorandum, "if a dispute arguably raises issues of contract interpretation cognizable under the grievance provision of the parties' collective-bargaining agreement and subject to binding arbitration, it may be appropriate to defer the case" (*NLRB General Counsel's Memorandum on Drug and Alcohol Testing*, Memorandum GC 87-5, at D-3 (Sept. 8, 1987).

Indeed, deferral to the arbitration process is consistent with the Labor Board's long-standing, discretionary policy of refraining from adjudicating unfair labor practice allegations in circumstances where the dispute is more appropriately resolved through the parties' voluntarily-adopted arbitration procedures. For example, in *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971), the Board dismissed a

complaint alleging that an employer had unilaterally implemented changes in wages and working conditions. The Board explained (*id.* at 839) that "disputes such as these can better be resolved by arbitrators with special skill and experience in deciding matters arising under established bargaining relationships than by the application by this Board of a particular provision of our statute." The Board concluded (*id.* at 841-842 (citation omitted)) that "'where, as here, the contract clearly provides for grievance and arbitration machinery, where the unilateral action taken is not designed to undermine the Union and is not patently erroneous but rather is based on a substantial claim of contractual privilege, and it appears that the arbitral interpretation of the contract will resolve both the unfair labor practice issue and the contract interpretation issue in a manner compatible with the purposes of the Act, then the Board should defer to the arbitration clause conceived by the parties."

More recently, the Board applied the same principles, deferring to the arbitration process in a case in which an employer was alleged to have violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by threatening an employee with unlawful disciplinary action. *United Technologies Corp.*, 268 N.L.R.B. 557 (1984). The Board explained (*id.* at 558) that "[a]rbitration as a means of resolving labor disputes has gained widespread acceptance over the years and now occupies a respected and firmly established place in Federal labor policy." The Board observed, moreover, that "[t]he reason for [the] success" of arbitration "is the underlying conviction that the parties to a collective-bargaining agreement are in the best position

to resolve, with the help of a neutral third party if necessary, disputes concerning the correct interpretation of their contract (*ibid.*).[10]

Thus, even where an issue is a mandatory subject of bargaining, the Labor Board may elect to defer to the arbitration process so that an arbitrator may resolve relevant disputes about the meaning of the underlying contact. Indeed, the General Counsel made that very point, in a portion of her memorandum overlooked by the court of appeals (Memorandum, *supra*, at D-3). By ignoring the Labor Board's practice of deferring to arbitration, the court of appeals drew the wrong lessons from the NLRA—assuming that NLRA principles are applicable in the first place.

4. Under a correct application of the "arguably justified" standard, we believe that petitioner's addition of a drug screen constitutes a "minor" dispute. In light of Conrail's long history of routine urinalysis testing, the established fitness for duty requirements, and petitioner's established rule prohibiting the use or possession of drugs by on-duty employees, there is more than sufficient basis to require respondents to press their contentions through the adjustment board process. The board may ultimately agree with respondents' position, but the Railway Labor Act requires that the board be given the opportunity to make that determination.

---

[10] This Court has noted that the Labor Board's practice of deferring to the arbitration process is consistent with the intent of Congress. See *William E. Arnold Co.* v. *Carpenters District Council*, 417 U.S. 12, 16-17 (1974).

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

JOHN R. BOLTON
Assistant Attorney General

THOMAS W. MERRILL
Deputy Solicitor General

LAWRENCE S. ROBBINS
Assistant to the Solicitor General

LEONARD SCHAITMAN
JEFFREY CLAIR
Attorneys

NOVEMBER 1988

☆ U. S. GOVERNMENT PRINTING OFFICE: 1988 241699 60769